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IN THE

Supreme Court of the United States

OCTOBER TERM 196[illegible]

No. [illegible]/153

LEWIS S. TRAVIS

AND

JEAN S. TRAVIS,

Petitioners,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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SUBJECT INDEX

	PAGE
Petition for a Writ of Certiorari	1
Citation to Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons for Granting the Writ	4
Conclusion	9

CITATIONS

CASES:

Catlin v. *United States* (1945) 324 U.S. 229 2, 4, 6, 7, 8

Hovey v. *Elliott* (1897) 167 U.S. 409 8

CONSTITUTION:

Amendment V 2, 5

STATUTES:

Declaration of Taking statute, 40 U.S.C. 258a-f 3

Act of September 1, 1959, 73 Stat. 451 3

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Petitioners pray that a writ of certiorari be issued to review the order of the United States Court of Claims granting respondent's motion to dismiss or for summary judgment and denying petitioners' cross-motion for summary judgment entered in the above-entitled case on March 1, 1961.

Citation to Opinion Below

The opinion of the United States Court of Claims rendered on March 1, 1961, printed in the Appendix, *infra*, is reported in 287 Fed. (2d) 916 (1961).

Jurisdiction

The order of the United States Court of Claims was entered on March 1, 1961. A timely petition for reconsideration, printed in the Appendix, *infra*, was denied on May 3, 1961. The jurisdiction of this Court is invoked under 28 U.S. Code, Section 1255 (1), 62 Stat. 928.

Questions Presented

1. In a Federal condemnation case where landowners have defended against the validity of the condemnation and have had no hearing on, or trial of, their defenses, should not the ruling below, that a declaration of taking, filed in said condemnation case, vested fee simple title in the United States, be reversed on the ground that it conflicts with this Court's decision in *Catlin* v. *United States*, 324 U.S. 229, at page 241?

2. In a Federal condemnation case where landowners contest the validity of the condemnation should it not be a condition precedent to the filing of a declaration of taking therein that the United States move successfully either to dismiss the answer or for summary judgment, since procedural due process guarantees a right to be heard?

3. In the administration of the provisions of the Declaration of Taking statute by the Department of Justice should that Department allow considerations of convenience to outweigh considerations of its responsibitilty to safeguard the rights of citizens to due process, especially when this Court has ruled favorably to the citizen on the question?

Statutes Involved

Declaration of Taking statute, 46 Stat. 1421, 40 U.S.C. 258 a-f.

Act of September 1, 1959, 73 Stat. 451[1].

Statement

The United States brought condemnation proceedings against the landowners (R. 3, 46-54, 58)[2], who are the plaintiffs here. The landowners challenged the validity of the condemnation proceedings by denial, affirmative defense, and demand for strict proof of all of the allegations of the complaint not denied (R. 4, 61-62). All this took place during the month of February, 1958. (R. 3, 4.)

The case was set down for trial at a future date, namely April 12, 1960 (R. 5, 136-137). But no hearing on, or trial of, the defenses ever took place. (R. 85-86.)

However, on September 11, 1958 (several months after the case had been brought to issue by the landowners' answer) the United States filed a declaration of taking in the case (R. 3, 65-69). About one year later, the Congress granted authority to the Federal Aviation Agency, the initiating agency in the condemnation action, to donate full ownership of a part of the property (the mansion "Leeton") to some one else (Act of September 1, 1959, 73 Stat. 451)[3]. This authority to donate was based on the assumption that the United States had fee simple title to all of the landowners' property. (Act of September 1, 1959, *supra*, first sentence after the enacting clause.) The authority so granted was exercised on February 1, 1960. (R. 9.) It is obvious, of course, that all these proceedings took place before the trial date of April 12, 1960.

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[1] Due to their length these provisions of law have been printed in full in the Appendix.

[2] All references in parentheses preceded by the letter "R" are to the certified Record of the United States Court of Claims.

[3] Appendix pp. 5a-6a.

The landowners have taken the position that February 1, 1960, was the actual date of taking and accordingly brought action in the United States Court of Claims for the value of their property as of that date. (R. 9.) The Court below has dismissed the landowners' complaint on the assumption that, despite the fact that defenses had been interposed and no hearing or trial had been held thereon, nevertheless the United States acquired fee simple title to the landowners' property on September 11, 1958, by the filing of the declaration of taking. If this premise is correct then the conclusion of the Court of Claims that the United States could give it away cannot be contested. However, the landowners contest the correctness of that premise.

Reasons for Granting the Writ

I.

The core of the decision of the Court below is in the following passage:

> "If, as the statutory and case law holds, the United States acquired title to the lands at issue on September 11, 1958, with the declaration of taking, then the legislature had the right and power to dispose of them one year later." (R. 165.)

The error in the above statement is obvious. This Court, in *Catlin* v. *United States* (1945) 324 U.S. 229, has stated that where a landowner contests the validity of condemnation and has had no hearing on, or trial of, his defenses, to hold that a declaration of taking filed in such a case vests fee simple title in the United States would leave the owner "no opportunity to question the taking's validity." (324 U.S. at p. 241.) In other words, if fee simple title may be so obtained the Government may, by the *ex parte* filing of a

document, the declaration of taking, strike out all defenses to condemnation without trial.

This Court proceeded to say that if, despite no hearing on the contest of a condemnation, the effect of filing a declaration of taking is to vest fee simple title in the United States, such would "raise serious question concerning the validity" of the Declaration of Taking statute (324 U.S. at page 241) since such result, of course, would be in clear violation of procedural due process. It was then ruled that to say fee title could be so obtained "would run counter to what reasonable constuction of the statute requires." (324 U.S. at p. 241.)

Thus it is apparent that case law holds a reasonable construction of the Declaration of Taking statute to be that the United States did *not* acquire fee title to the lands at issue on September 11, 1958, with the declaration of taking. The entire case of the United States here is bottomed on the assumption that it had complete fee ownership of the property prior to September 1, 1959. The *Catlin* decision is to the contrary.

This, alone, should justify reversal of the judgment below.

II.

The issue in this case, moreover, involves a Federal question of increasing importance. Apparently the inevitable necessity of the future is the ever-widening of the activities of the Federal Government. One of the results thereof will be great expansion of the power of eminent domain for airport, highway, housing, water resources, and like purposes. But these public investment programs should not be accompanied by a diminishing due process, insofar as the individual is concerned. As contrasted with some other governmental climes, our tradition demands that so long as a man is sued, even by his own Government, he may defend. In a suit under an asserted power of eminent domain, if the defendant is successful in defending

he keeps his land. Otherwise the judical procedure is a farce.

This points up the necessity that some lines of guidance be furnished the Department of Justice in connection with the use of the Declaration of Taking procedure. Its wholesale use in all cases by that Department verges on the irresponsible. This Court has already expressed doubt as to what property right, if any, is obtained by the filing of a declaration of taking in a condemnation case where the owner contests the validity of Government expropriation and has had no trial of his defenses. *Catlin v. United States*, *supra*. 324 U.S. at p. 241. The suggestion made in that case that the United States obtains "only a defeasible fee" under such circumstances, is based on the premise that the Government's defeasible fee results in fee simple title back to the owner if his defenses are successfully maintained.

But here, however, the United States has by statute presumed to give the very property away before trial. Worse even, the donee has destroyed the property. (R. 9, 161.)

This is the only case counsel have had brought to their attention where, pending trial of defenses in a condemnation action, the landowners involved have had fee title to their property vested by statute in some one else.

Hence there is squarely before this Court for the first time the necessity of deciding what property right, if any, the United States does obtain when it files a declaration of taking in a defended condemnation suit prior to trial or hearing of the defenses.

Utmost confusion exists on the point. This Court has admitted to "doubt" as to the Government's property right under such circumstances (329 U. S. at p. 241) and the suggestion, "defeasible fee", (id.) is obviously not applicable to undefended condemnation suits. The Department of Justice, despite this Court's language in the *Catlin* case, continues to insist that the Government obtains fee simple title in defended cases (R. 33, 34, 150, 151-152) and even has the temerity to cite the *Catlin* decision in support of this

assertion. (R. 33.) The Court below has agreed with the Department of Justice (R. 165). The landowners here insist that no property right whatsoever is obtained by the United States by the filing of the discussed document in a defended case before hearing or trial of the defenses. (R. 167-173.)

Counsel understands that it is a condition to the obtaining of Government funds for the money deposits accompanying the filing of declarations of taking that the Department of Justice certify that such filing and deposits vest "fee simple title absolute" in the United States. The day will come, of course, when a landowner will successfully defend against Government condemnation where a declaration of taking has been filed and the money deposited in court has been withdrawn. At that time the accounting branch of the Government may very well evince a lively interest concerning a practice of the Department of Justice of expending government funds for "defeasible fees." Especially since the landowner involved could well assert that the Government should share the fate of all others who pay money under mistake of law.

The entire problem can be solved by this Court by an expression of opinion that no declaration of taking should be filed in a contested condemnation case unless and until the Government has successfully moved either to dismiss the answer or for summary judgment.

III.

Of possibly graver moment is the point of administrative practice on the part of the Department of Justice. That Department is well aware of the ruling of this Court in *Catlin v. United States*, *supra*. Nevertheless, it continues to assert before the Courts that the filing of a declaration of taking vests fee simple title in the United States in *all*

cases, i.e. both in defended as well as in undefended condemnation suits.

Of course, there is no doubt that the effect of the filing of that document is to vest fee title in the United States in cases where no defense is made against the validity of the of the condemnation. But, as already pointed out, *Catlin v. United States*, *supra*, expressly holds that the United States does not get fee simple title by filing this paper when defenses have been interposed and have not been tried.

It is difficult to escape the impression that the Department of Justice just does not like this Court's decision in the *Catlin* case and, accordingly, compels every defending landowner to fight his way through all the Courts when he asks that his rights be determined by the language of that case. It is obvious that it would be much easier and more convenient for Government counsel to have every condemnation case reduced to a mere discussion of the amount of the money award. Every land-hungry bureaucracy also welcomes such a development.

But the Department of Justice is also supposed to be the citizen's protection against violation of constitutional safeguards and this position of trust should not be lightly regarded. In all of its actions it should at least follow the forms of due process.

Furthermore, this case indicates the dangers underlying the enactment of such "department sponsored" legislation as the Declaration of Taking statute. It is not too far from the wresting of property from the citizen to the wresting from him of his personal liberty. *Hovey v. Elliott* (1897) 167 U.S. 409, 419. Thus, the Court below has held that the filing of the declaration of taking vests fee simple title in the United States in all cases, and intimates that even had these landowners successfully defended in the District Court condemnation suit they could have regained their property only by Act of Congress. (R. 163.) But in this case even that result would not have been possible since by Act of Congress the property in the meantime had not

only been given away but also the donation was, by statute, under conditions compelling destruction.

Might, then, the Congress enact a law to the effect that upon indictment and arraignment for the commission of a Federal crime the Department of Justice could, *ex parte*, file a "declaration of criminality," pursuant to which a citizen would summarily be "deemed" guilty, immediately sentenced to prison, and even if upon later trial he were to be found innocent, could obtain release from incarceration only by an Act of Congress? These landowners can see no flaw in the analogy.

Conclusion

For the above reasons and for assurance of due process to all citizens who may defend against Federal condemnation, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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